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# The Structure of Arguments by Analogy in Law

Luís Duarte d'Almeida\* • Cláudio Michelon\*

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**Abstract** Successful accounts of analogy in law have two burdens to discharge. First, they must reflect the fact that the conclusion of an argument by analogy is a normative claim about how to decide a certain case (the target case). Second, they must not fail to accord relevance to the fact that the source case was authoritatively decided in a certain way. We argue in the first half of this paper (Sections 2 to 4) that the common view of the structure of analogical arguments in law cannot overcome these hurdles. In the second half (Sections 5 to 7) we develop an original account that aims to succeed where others failed.

**Keywords** Analogy • Judicial precedent • Legal argumentation • Legal reasoning • Justification of judicial decisions

## 1 Introduction

If you know something of the literature on analogy in law, the following picture will probably sound familiar. In an argument by analogy we compare at least two items. On the one hand, we have the source (or sources) of the analogy. On the other, we have the target. The target is what the argument by analogy is about. How does the argument proceed? There are a number of characteristics  $F, G \dots$  that are shared by both the source and the target. There is also some characteristic  $H$  that the source, but not the target, is known to have. An argument by analogy relies on the fact that source and target are alike with regard to characteristics  $F, G \dots$  to infer that they are also alike with regard to characteristic  $H$ . The conclusion of the argument is that the target, too, has characteristic  $H$ .

This general picture has long been endorsed by many theorists. Here is a small sample:

[T]he nature of the [analogical] inference or reasoning may be stated or suggested thus:— $A$  is  $x$  and  $y$  and  $z$ . An analogy or parity obtains between  $A$  and  $B$ ; for  $B$  as well as  $A$  is  $x$  and  $y$ . We know (or, at least, we assume), before and without the reasoning, that  $A$  is also  $z$ . We do not, however, know, before and without the reasoning, that  $B$  is also  $z$ . But since  $B$  as well as  $A$  is  $x$  and  $y$ , and we know, the reasoning apart, that  $A$  is also  $z$ , we infer, by analogy, or parity, that  $B$  is also  $z$ . (Austin 1911: 1005-6)

[A]nalogical reasoning . . . has a simple structure: (1)  $A$  has characteristic  $X$ ; (2)  $B$  shares that characteristic; (3)  $A$  also has characteristic  $Y$ ; (4) Because  $A$  and  $B$  share characteristic  $X$ , we conclude what is not yet known, that  $B$  shares characteristic  $Y$  as well. (Sunstein 1993: 743)

There is a fair amount of agreement among theorists of [analogical] argument about the basic structure of this type of argument; it is widely agreed that such arguments proceed by asserting that, because two (or more)

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\* University of Edinburgh, School of Law, Old College, South Bridge, Edinburgh EH8 9YL, United Kingdom

✉ Luís Duarte d'Almeida  
luis.duarte.almeida@ed.ac.uk

Cláudio Michelon  
c.michelon@ed.ac.uk

“analogized” items share some characteristics, one may infer that the lesser known item shares some additional characteristic with the better-known one. (Brewer 1996: 950)<sup>1</sup>

We argue in the first half of this paper (Sections 2 to 4) that this is not how one should think about analogy in law. Our discussion will be organised around the most well-known and influential attempt to articulate the structure of arguments by analogy within the frame of this popular view—Martin Golding’s account. Golding (2001: 107) offers the following as the scheme of arguments by analogy in law:

- (1)  $x$  has characteristics  $F, G \dots$
  - (2)  $y$  has characteristics  $F, G \dots$
  - (3)  $x$  also has characteristic  $H$ .
  - (4)  $F, G \dots$  are  $H$ -relevant characteristics.
- Therefore (from (1)–(4)),
- (5) Unless there are countervailing considerations,  $y$  has characteristic  $H$ .<sup>2</sup>

There are several problems with a scheme like this, as we will see. Some of the problems can be addressed by revising the scheme. We discuss in Section 3 what revisions are needed, and why. But in Section 4 we raise a deeper worry, one that even the revised scheme is unable to meet. It concerns the status of, and the need for, a premise like (4). Golding and many others think that analogical arguments hinge on the specification of the relevant characteristics that are shared by the source and the target. We take issue with that view; we disagree that

[f]or example, if it is argued from analogy that the war against the Thebans is an evil, because the war against the Phocians was an evil, *it must be shown that* the cases are similar with respect to the reason for applying the moral predicate to the source case. (Reidhav 2007: 99, emphasis added)

Our own account of analogy in the legal domain is articulated and defended in the second half of the paper (Sections 5 to 7). We begin our discussion, though, by showing, briefly but step by step, why anyone might come to think that something like the scheme just depicted—Golding’s scheme—does capture the structure of arguments by analogy in law.

## 2 Golding’s Model of Analogy

### 2.1 Non-Normative Contexts

Golding characterises the argument by analogy as one kind of non-deductive argument—a “close relative of induction by enumeration”—and proposes to clarify its structure by looking first at non-normative contexts. Consider one of his examples:

A car dealer has to decide whether to hire a job applicant, Brown, as a salesman. The dealer argues from Brown’s given resemblances to L, M, and N, who were previously hired as car salesmen and who turned out to be successful, that Brown will also be a successful car salesman: L, M, and N are graduates of Winsockie

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<sup>1</sup> See also Brewer (1996: 955, 967), with references to other authors who subscribe to this “widely endorsed form” (“analogical argument works this way: on the basis of one or more shared characteristics in a target and a source, a reasoner infers that the target possesses an inferred characteristic that the source is known to possess”). For more examples, see Landau (1981: 77-80), or White (2010: 572).

<sup>2</sup> See also Golding (1988). Our way of graphically representing the argument differs slightly from Golding’s, but the contents are quoted *verbatim*.

University, majored in physical education, and have good recommendations from their coaches; Brown [too] is a graduate of Winsockie University, majored in physical education, and has good recommendations from his coaches; L, M, and N were successful car salesmen; therefore Brown will be a successful car salesman. (Golding 2001: 44)

What should we say is the form of this argument? A first possibility that Golding entertains is this:

- (1)  $x$  has characteristics  $F, G \dots$
  - (2)  $y$  has characteristics  $F, G \dots$
  - (3)  $x$  also has characteristic  $H$ .
- Therefore (from (1)–(3)),
- (4)  $y$  has characteristic  $H$ .

Here “ $x$ ” stands for the source case or cases, which are the cases of L, M, and N, the previous successful salesmen; and “ $y$ ” stands for the target case, the case of Brown. So if we reconstruct the car dealer’s actual argument as an instance of this pattern, this is what we get:

- (1) L, M, and N were graduates of Winsockie University, majored in physical education, and had characteristics that elicited good recommendations from their coaches.
  - (2) Brown is a graduate of Winsockie University, majored in physical education, and has characteristics that elicited good recommendations from his coaches.
  - (3) L, M, and N were also successful salesmen.
- Therefore (from (1)–(3)),
- (4) Brown will be a successful salesman.

What kind of support for the conclusion do the premises provide? Again, the argument does not purport to be a deductive argument. So the claim is not that the truth of the premises suffices to guarantee the truth of the conclusion: the conclusion may turn out to be false—Brown may turn out not to be successful—even if (1), (2), and (3) are all true. Rather, the truth of the premises is meant to establish the conclusion as probable—as “more likely to be true than false” (Golding 2001: 43, 45).

The obvious problem with a scheme like this is that the mere similarity between source and target with respect to some characteristics  $F, G \dots$  does not make it more likely that they will be similar with respect to any further characteristic  $H$ . Any two items will resemble each other in many ways, and not all similarities will matter to the likelihood of the conclusion. As Golding puts it:

[T]here will be any number of respects in which Brown resembles L, M, and N (he and they like hot dogs, he and they play Ping-Pong, etc., etc.) and any number of respects in which he differs from them (he likes pistachio ice-cream but they do not, etc., etc.). The crucial question is whether the compared objects resemble (and differ from) one another in *relevant* respects, that is, respects that are relevant to possession of the inferred resemblance. (Golding 2001: 45; and see also 102-3)

This point is universally recognised in discussions of analogy. We need to revise the form of the argument to take it into account. Golding proposes the following:

- (1)  $x$  has characteristics  $F, G \dots$
  - (2)  $y$  has characteristics  $F, G \dots$
  - (3)  $x$  also has characteristic  $H$ .
  - (4)  $F, G \dots$  are  $H$ -relevant characteristics.
- Therefore (from (1)–(4)),

(5)  $y$  has characteristic  $H$ .

There are different ways in which the fact that an item has some characteristic or characteristics  $F$ ,  $G$  . . . can be relevant to the fact that it has some other characteristic  $H$ . The right kind of connection will vary from context to context. In the car salesmen example, Golding (2001: 46) suggests, it must be *causal* relevance that matters. But in other contexts the connection may be of a different kind.

This revised form is how Golding sees the basic pattern of arguments by analogy. It is intended to capture the structure of analogical arguments not merely in non-normative contexts, but also, with just some refinements, in normative contexts like the legal one (Golding 2001: 106).

## 2.2 The Legal Context

To show that legal arguments by analogy fit the revised pattern, Golding turns to a case that has since become one of the most quoted examples of analogical argument in law: *Adams v. New Jersey Steamboat Company*.<sup>3</sup> The issue in *Adams* was whether a steamboat company should be held liable for money stolen from a passenger's room without negligence on the part of either the passenger or the company. The court drew an analogy between steamboat companies and innkeepers, who owed a high duty of care and were liable for money stolen from a guest's room:

The principle upon which inn-keepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties . . . The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests.

The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that [were] originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations.

[T]he traveller who pays for his passage, and engages a room in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotelkeeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.

We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.<sup>4</sup>

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<sup>3</sup> *Adams v. New Jersey Steamboat Company* 151 NY 163 (1896). Golding is sometimes credited with having “unearthed” this case, but he didn’t: see Hall (1938: 577-8). Authors who discuss *Adams* include Brewer (1996), Rotolo (2001), Weinreb (2005), Posner (2006), Finnis (2011), and Schauer (2013).

<sup>4</sup> The court also discussed whether a previous case—*Carpenter v. New York etc. R.R. Co.*, 124 N.Y. 53—in which it had been held that “a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part”, could be taken

Here is how Golding (2001: 47) reconstructs the argument in *Adams* as an instance of his revised form; note that “H-relevance” is interpreted in terms of reasons for holding proprietors liable without proof of negligence:

- (1) A hotel guest procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor.
- (2) A steamboat passenger procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor.
- (3) A hotel guest’s proprietor has a stringent responsibility, such that the proprietor is liable, without proof of negligence, if money is stolen from the guest’s room.
- (4) Procuring a room for personal use and having one’s money and personal effects highly subject to fraud and plunder from one’s proprietor are reasons for the proprietor’s having such a stringent responsibility.

Therefore (from (1)–(4)),

- (5) A steamboat passenger’s proprietor is liable, without proof of negligence, if money is stolen from the passenger’s room.

Once again, this is not intended as a deductive argument. The premises are meant to support the conclusion, but they do not establish it as true. But does this square with the practice of legal argument? As Golding (2001: 48, 107) points out, courts presume to reach conclusions that are true or correct, rather than merely probable or more likely to be true or correct.<sup>5</sup> And indeed the court in *Adams* seems to take its own argument to establish conclusively that the steamboat company should be held liable for the money stolen from the passenger’s room. Yet how could that be if analogical arguments are non-deductive? Are courts mistaken about the strength of their own arguments?

The answer—Golding’s answer—is that courts are not mistaken. In the legal context, arguments by analogy are normative, practical arguments. They “purport to establish how a case or class of cases *ought* to be treated”, providing the court “with a reason for doing something, namely rendering a specific judgment” (Golding 2001: 48: 106-7). That there is reason to render a specific judgment does not conclusively establish that that is the correct judgment to issue; but it is “a feature of practical rationality” in “this context of practical normative reasoning” that

when a judge has a good reason for accepting a certain normative conclusion, he is *committed* to accepting and acting on the conclusion, unless there is (another) good reason for not doing so. (Golding 2001: 107)<sup>6</sup>

To bring this out, then, says Golding (2001: 110), we should slightly rephrase the conclusion of the argument by analogy, and regard the judge as “subjoining an additional argument” that conclusively establishes the “final decision on the question of law”. This is what we get:

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to apply—also on the grounds of an analogy—to the case at hand (which of course would have led to the opposite conclusion that the steamboat company ought *not* to be held liable for the stolen money). The *Adams* court argued, however, that *Carpenter* “does not . . . control the case under consideration . . . [I]t is quite obvious that the [train] passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked and otherwise guarded from intrusion.”

<sup>5</sup> As Atienza (1986: 116-20) remarks, this issue had also been raised by several other theorists of analogy; see also Bobbio (1938: 100-101), Kalinowski (1965: 166), and Wellman (1985: 85).

<sup>6</sup> This claim is perhaps too broad—Golding does not specify what he takes “good reason” to mean—but there is no need to dwell on the issue.

- (1)  $x$  has characteristics  $F, G \dots$
  - (2)  $y$  has characteristics  $F, G \dots$
  - (3)  $x$  also has characteristic  $H$ .
  - (4)  $F, G \dots$  are  $H$ -relevant characteristics.
- Therefore (from (1)–(4)),
- (5) Unless there are countervailing considerations,  $y$  has characteristic  $H$ .
  - (6) There are no countervailing considerations.<sup>7</sup>
- Therefore (from (5) and (6)),
- (7)  $y$  has characteristic  $H$ .<sup>8</sup>

The analogical argument proper, though, is the first argument in this chain: it is the argument that takes us from premises (1)–(4) to the conclusion in (5). And Golding’s claim is that although the inference from (1)–(4) to (5) is non-deductive, the “normative and practical” character of legal argument entitles us to say that “the conclusion is, in a sense, ‘entailed’ by the premises: that is, that the truth (or correctness) of the premises commits a judge to accepting the conclusion” (Golding 2001: 108).

We find this account both muddled and unable to capture what is actually going on in cases like *Adams*. Our first worry, developed in the following section, is that in Golding’s scheme the analogy between source and target seems to be doing no relevant work.

### 3 Are Source Premises Superfluous?

In Golding’s scheme, the actual analogy—the comparison—between the target and the source is laid down in premises (1) to (3). Premise (2) refers to the target, premises (1) and (3) to the source. It is unclear, however, that premises (1) and (3) have any role to play in the argument; they appear to be superfluous. And if that is the case, it means that the conclusion of the argument can be established without any reference to the source or to its similarity to the target. But then in what sense are these “analogical” arguments, arguments “by analogy”?

Let us try to motivate this worry. It does not specifically concern arguments in the legal context; it holds against the non-legal example as well. So consider once again the car salesmen example. How exactly should we reconstruct it to fit the revised scheme? The first three premises are straightforward enough; we have already seen what they might look like:

- (1) L, M, and N were graduates of Winsockie University, majored in physical education, and had characteristics that elicited good recommendations from their coaches.
- (2) Brown is a graduate of Winsockie University, majored in physical education, and has characteristics that elicited good recommendations from his coaches.
- (3) L, M, and N were also successful salesmen.

But how should we phrase the relevance premise, premise (4)? At least two candidate formulations come to mind:

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<sup>7</sup> The truth of a premise like (6) will depend on several factors, including the absence of stronger competing analogies: see Golding (2001: 110).

<sup>8</sup> When “ $y$ ” is taken to refer to a general case, a *further* argument would then be subjoined classifying any particular case at hand as an instance of  $y$ , in order to justify the particular normative outcome in that particular case: see Bańkowski (1991: 204-5).

- (4\*) The fact that L, M, and N are graduates of Winsockie University, majored in physical education, and had characteristics that elicited good recommendations from their coaches is likely to have made a significant causal contribution to their success as salesmen.
- (4) Being a graduate of Winsockie University, having majored in physical education, and having characteristics that elicit good recommendations from one's coaches are factors likely to make a significant causal contribution to one's success as a salesperson.

The first, (4\*), is a premise specifically about the three source items: it says that the fact that *they* have characteristics *F, G . . .* is relevant to the fact that *they* have characteristic *H*. The second, by contrast, is a general premise about how *having* characteristics *F, G . . .* is relevant to *having* characteristic *H* as well. Which of the two do we need?

The answer is that we need the more general formulation. We need (4), not (4\*). For unless our premise affirms the general relevance of characteristics *F, G . . .* to the possession of characteristic *H*, we will not have reason to think that Brown's having characteristics *F* and *G* is related to his possession of characteristic *H*. It is true that the car dealer's willingness to endorse a general premise like (4) is likely to stem from his reflection on the specific cases of L, M, and N, the previous salesmen. The car dealer's supposition that *their* verified success as salesmen is owed at least in part to their being graduates of a certain university, having majored in physical education, and so on, was presumably what led him to entertain the general hypothesis that these two sets of characteristics are correlated. But it is this more general hypothesis that is required for the argument to run.

Golding would agree. In his reconstruction of the court's argument in *Adams*, he too articulates the relevance premise as a general premise, not as a premise specifically about innkeepers. He phrases it (as we saw) like this:

"Procuring a room for personal use and having one's money and personal effects highly subject to fraud and plunder from one's proprietor are reasons for the proprietor's having such a stringent responsibility."  
(Golding 2001: 47)

But now notice that a statement like (4) could be restated as—or at least seems to directly support—the following conditional:

- (4') For every *x*, if *x* is a graduate of Winsockie University, *x* majored in physical education, and *x* has characteristics that elicit good recommendations from *x*'s coaches, then if *x* will be a salesperson, *x* will probably be successful as a salesperson.

Yet (4') and (2) together are sufficient to establish the conclusion that Brown is likely to be a successful salesperson (should he become one):

- (2) Brown is a graduate of Winsockie University, majored in physical education, and has characteristics that elicited good recommendations from his coaches.
  - (4') For every *x*, if *x* is a graduate of Winsockie University, *x* majored in physical education, and *x* has characteristics that elicit good recommendations from *x*'s coaches, then if *x* will be a salesperson, *x* will probably be successful as a salesperson.
- Therefore (from (2) and (4')),
- (5) If Brown will be a salesperson, Brown will probably be successful as a salesperson.



Indeed, it seems that (4') and (2) together are sufficient to establish this conclusion *deductively*. Remember that Golding says that the car dealer's argument is not deductive. His reason for saying that is that the premises, if true, allow us to infer only that Brown will probably be successful (Golding 2001: 43, 45). But trivially, sentences of the form "It is probably true that . . ." can feature as conclusions of deductive arguments. Our point is not that we should aim to give deductive reconstructions of inductive arguments. Our point, rather, is that premises (2) and (4) *as they stand*—as they read once we have formulated them according to Golding's own scheme—already establish deductively the claim that Brown will probably be successful as a salesman. The inference from (2) and (4') to (5), in other words, is not ampliative.<sup>9</sup>

The main worry, however, is not that the inference is deductive. The main worry is that the inference can dispense with premises (1) and (3) altogether. That is why we said that these two premises appear to be superfluous. They seem to be doing no argumentative work at all. They can be removed from the scheme. And there is nothing "analogical" about what's left—which is a straightforward deductive argument in the form of a universal *modus ponens*.

Versions of this charge—that once an argument by analogy is reconstructed to include a universal relevance statement like (4), the analogy itself is made logically redundant—have sometimes been discussed in the literature (see, for example, Govier 1987: 59-60; McKay 1997: 50-3; Juthe 2005: 19; Finnis 2011: 392-3; Spielthener 2014: 865). In fact, Golding himself entertains the objection at one point: "given the significance of premise (4), it could be said that premise (4) is 'doing all the work', as it were". But his reply fails to dismiss the charge. He says merely that "there is some truth to this remark, although premises (1), (2), and (3) are certainly indispensable to the argument" (Golding 2001: 109).

We think that the challenge *can* be met; it is not a fatal blow to a reconstruction of analogical arguments in law (or elsewhere) along the lines proposed by Golding. Rather, the challenge draws attention to one important aspect of arguments by analogy, an aspect that the scheme as it stands does not properly capture. The way to deal with this challenge is to revise the scheme yet again—not to abandon it.

There is no denying that (4) and (2) together logically entail (5). But that does not mean that premises (1) and (3) are superfluous in a reconstruction of the argument by analogy. Take once again the car salesman example. We said that the car dealer needs to rely on a general premise like (4) to reach a conclusion about the probability that Brown will be a successful car salesman. But we also pointed out that the car dealer is likely to have reached that general premise by considering the previous cases of L, M, and N, his other salesmen. It is by reflecting on those previous cases that he will have arrived at the hypothesis that attending Winsockie University, majoring in physical education, and so on, are related to one's success as a salesperson. Of course, that is only one way—rather than the only way—by which one could come to form the belief that (4) is true. But it is plausible to suppose that that is how the dealer might have reasoned in an example like this.

In that case, (1) and (3) are not superfluous in the reasoning process leading to the final conclusion. On the contrary, (1) and (3) are crucial steps in the justification of the claim in (4). How do premises (1) and (3) support the claim in (4)? Not deductively; but one might think that the car dealer's reasoning here would be an instance of either enumerative induction or abduction—inference to the best explanation. And whatever the best account of that inference might be, the point now is that Golding's mistake was not that he included (1) and (3) in his

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<sup>9</sup> It might be objected that we can only make this point because we have already smuggled the adverb "probably" into our formulation of premise (4), and that that is something that Golding's scheme does not contemplate. But this objection would be misguided. If we phrase premise (4) without the adverb, then what now follows—again deductively—is that Brown *will* be a successful salesman.

reconstruction of arguments by analogy. His mistake was to treat the move from (1)–(4) to (5) as one single, basic argument. He should instead have distinguished between two arguments: a non-deductive inference from the two source-premises to the relevance premise, followed by an inference from the relevance premise and the target premise to the final conclusion, along the following lines:

- (1) *a* has characteristics *F*, *G* . . .
- (3) *a* also has characteristic *H*.
- Therefore (from (1) and (3) (by induction, or by inference to the best explanation)),
- (4) For every *x*, if *x* has characteristics *F*, *G* . . ., then *x* has characteristic *H*.
- (2) *b* has characteristics *F*, *G* . . .
- Therefore, (from (4) and (2) (by universal *modus ponens*)),
- (5) *b* has characteristic *H*.<sup>10</sup>

One author who takes a similar approach to the reconstruction of arguments by analogy is Scott Brewer, whose model is influenced by Golding’s (Brewer 1996: 966, n. 135). Brewer analyses analogical reasoning as a “patterned sequence of distinct reasoning processes” (1996: 954),<sup>11</sup> with a first stage of abductive “discovery” of an “analogy-warranting rule” (which plays the same role as Golding’s relevance premise), a second stage at which this rule is refined and confirmed (or not) against a separate set of rationales, and a third stage at which the rule (if it survived the second stage) is deductively applied to the target items (Brewer 1996: 961). He also observes that by understanding arguments by analogy as a “sequence of distinct but coherent stages” he has met the objection that reliance on a universal rule renders one’s source premises unnecessary (Brewer 1996: 976-8). He is right about that. The objection is deflated; it no longer bites against a revised scheme like the one just given.<sup>12</sup>

To say that, however, is not to say that the revised scheme correctly displays the structure of arguments like the one in *Adams*, which both Golding and Brewer take as a clear example of analogical argument in law. We agree that *Adams* is a good example. As we will now see, however, it does not fit the scheme.

## 4 What About Normative Conclusions?

One noteworthy feature of the scheme we have been discussing—a feature we have not yet remarked upon—is the way in which the conclusion and the premises are phrased. With the exception of the relevance premise, they are phrased as claims that either the source (“*x*”) or the target (“*y*”) “has” a certain characteristic. Thus premises (1) to (3),

- (1) *x* has characteristics *F*, *G* . . .
- (2) *y* has characteristics *F*, *G* . . .
- (3) *x* also has characteristic *H*.

are given the same form as the conclusion:

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<sup>10</sup> We have retained here the original numbering of premises and conclusions; and to avoid confusion we used “*a*” and “*b*”—rather than “*x*” and “*y*”—to stand for the source and the target cases.

<sup>11</sup> See also Bobbio (1938: 87-95), Sunstein (1996: 65-6), Reidhav (2007: 35-6, 72-84), Shecaira (2013: 409, 428-30), and Spielthener (2014: 867).

<sup>12</sup> Golding himself, however, would not welcome this revision: see note 15 below.

(5) *y* has characteristic *H*.

Now this language does not seem much out of place when we are concerned, as in the car salesman example, with arguments for non-normative conclusions. The car dealer's conclusion—that Brown probably will be a successful salesman—is a descriptive rather than normative claim: it is a claim about what probably *will* be the case, not a claim about what ought to be the case. And the car dealer's premises, too, are descriptive claims: premises (1), (2), and (3) are claims about characteristics that Brown and the previous salesmen do in fact have; and the relevance premise, premise (4), is a claim about the likelihood that any salesperson who has those characteristics will also have the further characteristic of being successful. The car dealer's argument, then, has “descriptive premises and a descriptive conclusion”, as Golding remarks (2001: 107); and of course, a descriptive conclusion is precisely what one would expect if all of one's premises are descriptive.

But what about the legal domain? Here, as Golding (2001: 42, 107) also points out, the argument by analogy is an argument for a “normative” conclusion, a conclusion about how a “case or class of cases *ought* to be treated” (see also Boonin 1965: 189; Rinaldi 1971: 366-7; Gianformaggio 2008: 136-7). Yet how could such a conclusion be warranted if one's premises are all of them descriptive claims—as again the language of the scheme would lead us to suppose? How could conclusions about characteristics that the target *ought to have* be grounded solely on claims about characteristics that either the source or the target *has*? And wouldn't that run counter to the common view that arguments by analogy are arguments for the conclusion that there is a certain characteristic that is *shared* by source and target? This is sometimes expressed in terms of a characteristic being “transferred” from source to target, the point again being that the target *has*—not that it *ought to have*—that characteristic.

Does the scheme break down, then, when applied to the legal context? What could a defender say? One thing they could say is that in the legal context the premises of analogical arguments are *not* all of them descriptive: that at least one of the premises is a normative claim. And in fact that is what Golding does say. Here again is his reconstruction of the argument in *Adams*, now with its conclusion rephrased to bring out its normative character:

- (1) A hotel guest procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor.
- (2) A steamboat passenger procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor.
- (3) A hotel guest's proprietor has a stringent responsibility, such that the proprietor is liable, without proof of negligence, if money is stolen from the guest's room.
- (4) Procuring a room for personal use and having one's money and personal effects highly subject to fraud and plunder from one's proprietor are reasons for the proprietor's having such a stringent responsibility.

Therefore (from (1)–(4)),

- (5') Unless there are countervailing considerations, a steamboat passenger's proprietor *ought to be held* liable, without proof of negligence, if money is stolen from the passenger's room.

Premises (1) and (2), says Golding (2001: 108), are indeed “descriptive statements”. By contrast, however, premises (3) and (4) should *both* be regarded as normative rather than descriptive statements:

Premise (3) . . . will be a normative statement, and its truth or correctness will generally be established by an appeal to a prior decision or trend of decisions. Thus in the *Steamboat* case, Judge O'Brien's premise (3) was the proposition about the stringent responsibility of innkeepers . . . which he took to be a settled rule of the common law, repeatedly affirmed in prior cases. Premise (4) also will be a normative statement, and its truth or correctness may be established by an appeal to the precedent that is appealed to in reference to premise (3). (Golding 2001: 108, notation modified)

How plausible are these claims? Start with premise (3): the statement that

- (3) A hotel guest's proprietor has a stringent responsibility, such that the proprietor is liable, without proof of negligence, if money is stolen from the guest's room.

Is this a normative statement? It is true that the claim made in premise (3) is very different from the claims in premises (1) and (2). Premise (3) is a statement of *law*—it is, as Golding says (2001: 108), a statement of what the court in *Adams* “took to be a settled rule of the common law.” But that does not mean that premise (3) is a normative statement in the relevant sense of “normative”. On the contrary, it would seem that premise (3) must indeed be a descriptive rather than normative statement. For it is a statement of what the settled law on the matter *is*—a statement of what the settled legal liability of hotel proprietors actually is in cases like this—rather than a statement about what the settled law on the matter *ought* to be. Premise (3) is a statement of settled law, yes—but it is a *descriptive* statement of settled law.

We can expand on this point. Suppose that a court has to decide a case of money stolen from a *hotel* guest's room without negligence on either the guest's or the proprietor's part. What should the verdict be? If the statement in (3) is true or correct, then the answer seems clear: the court should hold the hotel proprietor liable. And what is it that makes the statement in (3) true or correct? One way of establishing a premise like (3) is, as Golding (2001: 108) says, “by appeal to a prior decision or trend of decisions”. That means that there will have been some occasion on which a court will have held some individual hotel proprietor liable without negligence for money stolen from a guest's room; and that this decision will have constituted binding precedent for future cases of the same description. In other words, the “source” case—the general case of a hotel guest's proprietor's liability for money stolen from a guest's room—is authoritatively settled in a certain way; and that is what makes premise (3) true or correct.

This feature of the source case, however, is one that the “target” case of a steamboat company's liability for money stolen from a passenger's room cannot be said to “have” or “share”. The target case, unlike the source case, is not authoritatively settled. The point is not just that the precedent that governs the liability of hotel proprietors is not directly applicable to the case at hand. The point, more broadly, is that the case at hand is not encompassed by *any* binding precedent—or indeed by any statutory provision. If it were, there would be no question of analogy to begin with (see Goodhart 1930: 180-1, n. 73; Schauer 2008; Lamond 2014: 576-82). If there were directly applicable authority for the proposition that steamboat companies are liable without negligence for money stolen from a guest's room, then that would be the basis on which any particular case of that description would and should be decided. There would be no need or reason to turn—looking for guidance as to how to decide any such case—to the case's similarity with any other authoritatively settled case.

So a judge who has to decide any such case—a particular case for which there is no settled rule—finds herself in a very different position from a judge who is able to reach a decision by directly applying precedential or statutory authority to the case at hand. Ultimately, of course, both judges will be concerned with the same normative question: how is the case at hand—the particular case—to be decided? But there is a previous question that the former judge, unlike the latter, needs to address. The former judge needs to reach a view on what the rule *should* be for cases like the one at hand. And that is a question that cannot be answered solely on the basis

of information about how some other general case—the “source” case—*has* in fact been authoritatively settled, either by a previous court or by a legislator.

We will be able to see the point more clearly if we turn our attention to premise (4). This is the premise that is supposed to establish a connection—a “relevance” connection—between the characteristics described in premises (1) and (2), and that described in premise (3):

- (4) Procuring a room for personal use and having one’s money and personal effects highly subject to fraud and plunder from one’s proprietor are reasons for the proprietor’s having such a stringent responsibility.

Is this, as Golding claims it is, a normative premise—in the relevant sense of “normative”? The answer is not obvious, partly because there seems to be something not quite right about the way this premise is worded.

Consider first the reference to “reasons for the proprietor’s having such a stringent responsibility”. This is phrased not as a specific reference to *hotel* proprietors, but as a blanket reference to proprietors—a reference to proprietors *in general*. So the premise seems to presuppose that the proprietors it mentions do have such a stringent responsibility. But we do not know that this presupposition is true. What we do know is that *hotel* proprietors, innkeepers, have such a responsibility: we know that *their* liability is authoritatively settled under existing law. That is what premise (3) tells us—and premise (4), remember, is meant to track the same characteristic of the source-case that is referred to in premise (3). By contrast, as we noted, the responsibility of steamboat owners is not similarly settled. So if indeed premise (4) were to be read as presupposing that proprietors in general—including steamboat owners—are strictly liable under such circumstances, it seems that it could not be correct. And if, on the other hand, we read it down to refer only to the specific case of hotel proprietors, then we will no longer have the sort of premise that is needed for the argument to run, for, as we saw in Section 3, we need the relevance premise to be sufficiently general to encompass the target case.

Premise (4) is also equivocal in one crucial respect. The reference to “*reasons* for the proprietor’s having such a stringent responsibility” can be read in two different ways. It can be read, first, as a reference to the reasons behind the previous court’s decision to hold hotel proprietors liable for money stolen from a guest’s room: the reasons that the previous court actually took to be good reasons for adopting the view that hotel proprietors should have such a stringent responsibility. Note that these reasons are not what is normally called the “*ratio decidendi*” of the precedent-setting decision. They are the reasons “behind” the *ratio*, as it were: the reasons that the previous court took to support its decision to settle the general case of the liability of hotel owners the way it did. But if we read premise (4) along these lines—to refer to *what the previous court took to be good reasons* for its ruling—we again end up with a purely descriptive claim that will not support the argument’s normative conclusion that the target case ought to be decided in a certain way.

What if we read premise (4) as a statement that *there is good reason* to hold proprietors liable without negligence for money stolen from guests’ rooms? Understood along these lines, premise (4) would be a normative claim in the relevant sense. Moreover, it could retain its broad scope—which it needs to have, as we have seen, in order for the argument to run—as a claim about the responsibility of proprietors *in general* and not merely about the responsibility of hotel owners. We could rewrite it more transparently as follows:

- (4') If a person procures a room for personal use, and that person’s money and personal effects are highly subject to fraud and plunder from the proprietor, then there is reason to hold the proprietor liable, without proof of negligence, if money is stolen from that person’s room.

But would this give us the sort of premise we need? It would not. The worry now is not that the conclusion of the argument would be unsupported by the premises. Indeed, the conclusion—that absent countervailing considerations, steamboat passengers’ proprietors *ought* to be held liable in these circumstances—would follow deductively from the conjunction of premise (4′) and premise (2):

- (2) A steamboat passenger procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor.

What then is the worry? It is actually twofold. First, in normative domains it is far from clear whether there is room for anything like the non-deductive inferential move, discussed in Section 3, from the source case *to* a claim like the one in (4′). We have already seen in Section 3 that a correctly formulated relevance premise can be directly and deductively applied to the target case. We also saw that this fact gives rise to the objection that source premises are superfluous and that there is nothing really “analogical” about arguments by analogy. We were able to dismiss this objection; but we were concerned only with examples of arguments by analogy in non-normative domains. The point we made was that when dealing with arguments for non-normative conclusions, like the argument in the car salesmen example, it is at least plausible to suppose that the relevance premise may itself be justified by reference to the source case or cases—not deductively, but either inductively or abductively. So we were able to dismiss the objection—and to hold on to the argument’s analogical aspect—by recasting the argument as a complex inferential pattern:

- (1) *a* has characteristics *F*, *G* . . .
- (3) *a* also has characteristic *H*.
- Therefore (from (1) and (3) (by induction, or by inference to the best explanation)),
- (4) For every *x*, if *x* has characteristics *F*, *G* . . ., then *x* has characteristic *H*.
- (2) *b* has characteristics *F*, *G* . . .
- Therefore, (from (4) and (2) (by universal *modus ponens*)),
- (5) *b* has characteristic *H*.<sup>13</sup>

This is a move, however, that is not obviously available in normative domains like the legal one. Consider once again the *Adams* case: what would the first inference have to be? Now that we have worked our way towards a more clearly formulated version of its premise (4), we know what the answer would be:

- (1) A hotel guest procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor.
- (3) A hotel guest’s proprietor has a stringent responsibility, such that the proprietor is liable, without proof of negligence, if money is stolen from the guest’s room.
- Therefore (from (1) and (3) (by induction, or by inference to the best explanation—or the normative counterparts of these modes of inference)),
- (4′) If a person procures a room for personal use, and that person’s money and personal effects are highly subject to fraud and plunder from the proprietor, then there is reason to hold the proprietor liable, without proof of negligence, if money is stolen from that person’s room.

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<sup>13</sup> See the text accompanying note 10 above.

But how could (4) be established on the basis of (1) and (3)? How could we “induce” normative claims about how a given case ought to be settled, purely on the basis of descriptive claims about how some previous—and narrower—case has in fact been settled? What room is there to speak of inferences to the best explanation—even the best *normative* explanation—that would yield such normative statements merely on the basis of descriptive claims about the *explananda*? Absent some cogent account of any such inference—and we do not know of any—the scheme does seem to break down, then, when applied to normative domains, including the legal context.

Yet even if we had a way of showing how normative claims like (4) could be justified on the basis of claims like (1) and (3), we would still be left with an unsatisfactory reconstruction of legal arguments by analogy. For the resulting picture would be one on which the argument hinges on the articulation of a rule encompassing the target and the source cases. It is often said of arguments by analogy in law, however, that they proceed “from case to case” (or “from particular to particular”). And what this is taken to mean is not simply that when arguing by analogy we rely on claims about a “source” case in order to reach a conclusion about a “target” case. What it is taken to mean is, less trivially, that the argumentative move from “source” to “target” is accomplished *without* it being necessary to identify an overarching rule—a rule along the lines of (4)—that subsumes the two cases.<sup>14</sup> And it is certainly true that the court in *Adams* did not venture to articulate a general rule under which both hotel owners and steamboat companies would come out as liable. The court said that the two cases, because they were analogous, should be governed by “the same rule of responsibility”. But it did not say—it did not take itself to have to say—what that rule was. So the court’s argument seems not to fit the two-part scheme that we have been discussing. Or rather (for we are taking *Adams* to be a representative specimen), the scheme seems not provide us with an adequate reconstruction of the structure of arguments by analogy in law.<sup>15</sup>

One might think, of course, that the *Adams* court was indeed committed to an overarching rule, and simply failed to give it an express formulation; and that it would be for the interpreter to make that rule explicit when charitably reconstructing the argument. One might even think that the court *had* to be committed to such a rule: that a judge cannot decide on the basis of an analogy between two cases without actually referring to, if not formulating, the rule by which they are rendered analogous.<sup>16</sup> One would then have to dismiss as misguided the idea that analogical arguments do (or even can) proceed “from case to case”. But that is not our view. We think that an alternative account of the structure of arguments by analogy in law can be given that not only avoids the shortcomings of the scheme we have been discussing, but does

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<sup>14</sup> See e.g. Patterson (1942: 903-4), Halper (1968: 42), Murray (1982: 847-8), Klug (1982: 115-6), Hunter (2001: 1208, 1252), and Schauer (2009: 98-100); and also Quine and Ullian (1978: 90-95) and Govier (1989: 147-8). The doctrine of binding precedent is sometimes also said to involve reasoning “from case to case”; but here there is normally no implication—on the contrary—that the decision in the second case can dispense with the invocation of a rule. Edward Levi’s well-known description makes this quite clear: “The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is *made into a rule of law* and then applied to a next similar situation”: Levi (1949: 1-2, footnote omitted, emphasis added).

<sup>15</sup> That is why Golding, who himself briefly considers the possibility of interpreting arguments by analogy as “involving two steps”, the first step consisting in “*generalizing* a broad rule from the prior case(s)”, and the second “in the *deduction* of the decision” for the instant case from that generalised rule, goes on to say (2001: 103) that “under this interpretation there is, strictly speaking, no argument by analogy at all”.

<sup>16</sup> See e.g. Westen (1982: 1162-3), Eisenberg (1988: 83-96), and Alexander and Sherwin (2008: 66-88); but see, for discussion, Postema (2007: 108-116).

also not turn on the articulation of a broader general rule. That is what we will now try to provide.

## 5 A Fresh Start

We need a fresh start. Our discussion of the commonly accepted scheme taught us that a successful account of analogy in law needs to discharge two burdens. On the one hand, we saw that the conclusion of an argument by analogy in law is a normative claim. That means that any adequate reconstruction of the argument will need to include at least one normative premise. This is the first burden. But we also saw that this burden needs to be discharged in such a way that the reference to the source case—and to the contingent fact that the source case has been settled in a certain way—does not become argumentatively inert. This is the second burden.

We believe that these burdens can be discharged. This cannot be accomplished, though, by further revision of the scheme we have been discussing. Rather, the whole matter of analogy in law needs to be framed, we think, in a different way. In this and the following sections we present and defend our views.

We begin by simply laying down our proposed reconstruction of the scheme of arguments by analogy in law. The scheme uses several symbols and terms that we shall have to introduce and explain—“ $G_T$ ”, “ $G_S$ ” (“ $T$ ” is for “target”, “ $S$ ” for “source”), “general question”, “sub-question”, “uniform answer”, and so on—but for now it will give you a general idea of the account that we will be defending. Here it is:

- (1)  $G_T$  is a general question that is not authoritatively settled.
- (2)  $G_S$  is a general question that is authoritatively settled.
- (3) There is a (more) general question of which both  $G_T$  and  $G_S$  are sub-questions, and to which there is a uniform answer. (Call this more general question “ $G_C$ ”.)
- (4) For every  $x$  and every  $y$ , if (a)  $x$  is a general question that is not authoritatively settled, (b)  $y$  is a general question that is authoritatively settled, and (c) there is a (more) general question (“ $G_C$ ”) of which both  $x$  and  $y$  are sub-questions, and to which there is a uniform answer, then there is reason to adopt, with regard to  $x$ , the answer that is implied by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to- $y$ .

Therefore (from (1)–(4)),

- (5) There is reason to adopt, with regard to  $G_T$ , the answer that is implied by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to- $G_S$ .
- (6) The answer that is implied, with regard to  $G_T$ , by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to- $G_S$ , is answer  $A$ .

Therefore (from (5) and (6)),

- (7) There is reason to adopt, with regard to  $G_T$ , answer  $A$ .

Golding’s scheme was deceptively simple; ours is deceptively complex. Let us now motivate and explain this proposal.

## 6 Basic Concepts and Terminology

### 6.1 Particular Questions



We will consider some hypothetical situations inspired by the *Adams* decision and by its background. Imagine a judge—call her Amy—who has to decide a certain case. Amy is presented with a series of descriptions of particular facts, and with a question regarding those facts. She is told, suppose, that on the night of June 27th, 2015 Mr G checked in at Ms H’s hotel; that Mr G was given room #158 on the first floor; that he had £200 with him; that the money was stolen from his room during the night; that there was no negligence on his part; and that Ms H, the hotel proprietor, had also not been negligent in any way. Amy is being asked by Mr G to hold Ms H liable for the stolen money, and so she needs to address the following question:

(Q1) Should Ms H be held liable for the money stolen from Mr G’s room?

A question of this sort is what we will call a *particular question*. It is both a practical and a normative question—it is a question about whether Amy should perform a certain action, the action of holding Ms H liable for the stolen money—and it is being asked wholly with regard to a particular situation. It is being asked with regard to Mr G and Ms H (rather than, say, with regard to hotel guests or owners *in general*), and with regard to a particular event, a particular theft from Mr G’s room.

Suppose moreover that there is no binding precedent or other applicable authority on the matter, and that Amy’s view is that Ms H *should* indeed be held liable for the money stolen from Mr G’s room.

Let us now explore this situation in greater detail, highlighting some points that—trivial as some of them may sound—can be easy to overlook.

## 6.2 General Questions and Comprehensive Answers

Amy has a friend, Barbara, who is interested not only in her decisions but also in how well she explains them. Barbara knows about what happened to Mr G, and she knows that Amy’s view is that Ms H should be held liable for the stolen money. But Barbara also knows of something else that happened to Mr G: the morning after the theft, Mr G carelessly misplaced his watch on the breakfast table, and the watch too was stolen. And Barbara wants to know whether Amy would hold Ms H liable for that as well. In fact, Barbara wonders rhetorically, doesn’t the fact that Amy think that Ms H should be held liable for the stolen money mean that she would have—in order to be coherent—to also hold Ms H liable for the stolen watch? After all, this too is a case of something that happened to Mr G in the premises of Ms H’s hotel; this too is a situation in which Mr G suffered a loss; this too is a situation in which the question of Ms H’s liability arises. So shouldn’t the two cases be decided in the same way? And if not, why not?

It may seem obvious that Amy’s answer should be that *no*, her decision in the first case does not commit her to the view that Ms H should be liable in the second case as well. But it is worth considering what she might say in reply to Barbara.

It wouldn’t do for Amy to reply by pointing out that since (Q1) and (Q2) are different questions, there is no reason why answering “Yes” to one should imply answering “Yes” to the other:

(Q1) Should Ms H be held liable for the money stolen from Mr G’s room?

(Q2) Should Ms H be held liable for the watch stolen from Mr G’s breakfast table?

Barbara could agree that one might coherently answer “Yes” to (Q1) and “No” to (Q2) (or “Yes” to both, or “No” to both). She could agree that (Q1) and (Q2) are independent questions.

But it is for Amy to explain how exactly their independence is to be established. For what if in the first situation the hotel owner had been, not Ms H, but a different individual, Mr O, all the other facts remaining the same? In that case the question before Amy would have been:

(Q3) Should Mr O be held liable for the money stolen from Mr G's room?

Given that Amy's answer to (Q1) is "Yes", then wouldn't coherence require, Barbara could ask, that she answer "Yes" to (Q3) as well? Or would Amy still say that (Q1) and (Q3) are "different" questions? There is a sense in which (Q1) and (Q3) are different, of course—one is about Ms H, the other about Mr O—but is that the relevant sense of "different"?

Amy would do better to say that what matters in the original case is not that the hotel was owned specifically by Ms H as opposed to some other individual. It is true that the hotel *was* owned by Ms H; but *that the hotel was owned by Ms H* is not a relevant fact. Nor does it matter that the guest was Mr G as opposed to any other guest, that Mr G's room was on the first floor, or that the theft took place on a Saturday. What matters, rather, Amy says—let us suppose—is that Ms H was a hotel owner, and Mr G a guest, and that Mr G's money was stolen from his room without negligence on either part.

If she said this, Amy would be justifying her answer to (Q1) by reference to the view that she takes on this other question:

(Q4) Should hotel owners be held liable for money stolen from guests' rooms without negligence on the part of either the guest or the owner?

There are a couple of things worth noticing about (Q4). The first is that (Q4), unlike (Q1), (Q2), or (Q3), is not a particular question. (Q4) is what we will call a *general question*; it is a normative question about *any* individual that satisfies the relevant general description.

It is also a question to which one could give either a comprehensive "Yes" answer, or a comprehensive "No" answer. These are not the only possible correct answers: it is conceivable that the correct answer to (Q4) would be "It depends". But in order to justify her answer to (Q1) by reference to the view she holds on (Q4), Amy needs to hold that there *is* a correct comprehensive answer ("Yes") to (Q4).

Amy's answer to (Q4), then, is itself a general claim; its form can be rendered as:

(R) For every  $x$  and every  $y$ , if  $x$  is a hotel owner and  $y$  is a guest at  $x$ 's hotel, and money belonging to  $y$  is stolen from  $y$ 's room without negligence on the part of either  $x$  or  $y$ , then  $x$  should be held liable for the stolen money.

We will say that comprehensive answers to general normative questions like (Q4)—that is, "Yes" or "No" answers that cover the entire domain of the question—are *rules*. (To be clear, the comprehensive "No" answer to (Q4) would not negate (R) externally; it would negate its consequent: "... then  $x$  should *not* be held liable for the stolen money.") Amy's decision in the particular case before her, then, would be justified by reference to a rule, (R), that she is prepared to defend as the correct answer to (Q4).

Amy can now identify a sense in which questions (Q1) and (Q3) are both "the same", and "different" in turn from (Q2). (Q1) and (Q3) are the same in the sense that the particular facts in each situation instantiate the general description in (Q4). (Q1) and (Q3) are both *sub-questions*—as we will say—of (Q4).

From the point of view of someone who endorses a comprehensive answer ("Yes" or "No") to (Q4), then, (Q1) and (Q3) are not relevantly different, and must be dealt with in precisely the same way, for any comprehensive answer to (Q4) implies a determinate answer to (Q1),

(Q3), or to any other particular sub-question of (Q4); and the differences between the particular situations are immaterial for how the answers to the respective particular questions are to be justified.

### 6.3 Comparing Questions

We will return to the notion of a sub-question, but let us first go back to Amy's formulation of question (Q4), which prompts Barbara to raise a further query. She now presents Amy with the case of Ms P, a passenger in a steamboat operated by company S. Ms P's money was stolen from her cabin overnight with no negligence on either her part or the company's. This raises the following particular question:

(Q5) Should steamboat company S be held liable for the money stolen from Ms P's cabin?

But Barbara's own question to Amy is not directly about Amy's views on (Q5). Barbara's question is again whether Amy's views on the original case of Ms H do not commit her, at least if she wants to be coherent, to the view that the steamboat company too should be held liable in this case.

Barbara understands, of course, that (Q5) is *not* a sub-question of (Q4). She realises that Amy's view on (Q4)—her endorsement of (R)—does not by itself tie her to any views on the liability of this or any other steamboat company. Still, Barbara wonders, are the two situations relevantly different? Reflecting on the original case before her, Amy has expressed views about the *irrelevance* of features such as the identity of the hotel owner, the fact that the room was situated on the first floor, or the day of the week on which the theft had occurred. But why should Amy think that it matters that the theft was from a *hotel room*, rather than, say, from commercially provided accommodation, which would include steamboat cabins? Barbara's question, then, boils down to this: why endorse (R) *rather than some other rule* as the relevant rule on which to justify the decision in the original case of Ms H?

There are different answers that Amy could plausibly give. One is that she is not quite certain that steamboat companies should indeed be held liable for money stolen from a passenger's cabin. She can see the similarities between the steamboat and the hotel situations, but she can also see some differences, and she is not sure that these are all irrelevant. On the other hand, she *is* prepared to endorse a rule like (R), and that, after all, is all she needs for the purpose of justifying her decision in the case of Ms H.

If this were Amy's answer, Barbara would have to agree that Amy was right. By endorsing (R), Amy is not committing herself to the view that it is *only* when the accommodation provided is a *hotel* room that the provider should be held liable for money stolen without negligence on anyone's part. (R) specifies a sufficient condition of liability, not a necessary one. So by endorsing a rule that does not encompass steamboat companies, Amy is not expressing any view as to whether steamboat companies should be held liable in similar circumstances. Perhaps they should, perhaps not—maybe Amy would have to learn and think more about steamboat companies before forming definitive views on the matter. But since the question of Ms H's liability does not turn on that issue, her endorsement of (R) is a perfectly satisfactory way of justifying her decision in the case at hand.

Suppose, though, that Amy *is* swayed by Barbara's example. She hadn't thought of steamboat companies; but reflecting on the hypothetical she agrees that there seems to be no relevant difference from the case of hotel owners. She agrees, that is, that there is a comprehensive "Yes" answer to the following general question:

- (Q6) Should steamboat companies be held liable for money stolen from passengers' cabins without negligence on the part of either the passenger or the company?

But she does not merely happen to agree that steamboat companies should be held liable for money stolen from their passengers' cabins, *and* that hotel owners should be held liable for money stolen from their guests' rooms. She thinks that both should be held liable *for the same reason*. In other words, Amy finds, upon reflection, that there is no consideration she could offer in support of her decision in the original case of Ms H that would not equally apply had the money been stolen from a steamboat cabin instead; the relevant features of the two cases seem to be the same. So Amy agrees that the formulation of the rule she had originally adopted, rule (R), could be discarded in favour of a broader rule that captures these shared features.

What then is the more general question of which *both* (Q1) and (Q5) can be said to be sub-questions? How should Amy articulate the broader rule on which she now thinks her decision in the *first* case could be justified? Suppose Amy offers the following—a rule about providers of accommodation:

- (R2) For every  $x$  and every  $y$ , if  $x$  is a provider of accommodation and  $y$  is an occupier of accommodation provided by  $x$ , and money belonging to  $y$  is stolen from  $y$ 's accommodation without negligence on the part of either  $x$  or  $y$ , then  $x$  should be held liable for the stolen money.

Amy would then be justifying her answer to (Q1), her original question, by reference to the view that she is prepared to take on the following general question:

- (Q7) Should providers of accommodation be held liable for money stolen from an occupier's accommodation without negligence on the part of either the occupier or the owner?

Note that the strength of Barbara's steamboat hypothetical depends on Amy's recognising that there is no relevant difference between the case of hotel owners and the case of steamboat companies. Importantly, this is something that Amy can recognise, and indeed feel certain of, *even if* she is not herself clear about what the relevant property is that hotel owners and steamboat companies both share. Amy may have a strong intuition, for example, that the two situations are not relevantly different, but only a relatively diffuse understanding of the relevant point of similarity. She may feel more comfortable in her belief that hotel owners and steamboat companies should both be liable for the same reason, than in her belief that (Q7) does succeed in capturing the relevant shared features of the two cases. We return to this point in Section 6.5.

#### 6.4 Sub-Questions and Uniform Answers

So far we have spoken of particular questions as sub-questions of general questions. Consider the following questions once again:

- (Q1) Should Ms H be held liable for the money stolen from Mr G's room?  
(Q4) Should hotel owners be held liable for money stolen from guests' rooms without negligence on the part of either the guest or the owner?

We saw that (Q1), a particular question, is a sub-question of (Q4): any comprehensive answer to (Q4) entails—given the particular facts of Ms H’s case—a determinate answer to (Q1). Likewise, (Q5) is a sub-question of (Q6):

- (Q5) Should steamboat company S be held liable for the money stolen from Ms P’s cabin?
- (Q6) Should steamboat companies be held liable for money stolen from passengers’ cabins without negligence on the part of either the passenger or the company?

But general questions too can be sub-questions of other (more general) questions. Both (Q4) and (Q6) can be described as sub-questions of (Q7):

- (Q7) Should providers of accommodation be held liable for money stolen from an occupier’s accommodation without negligence on the part of either the occupier or the owner?

Indeed, since both hotel owners and steamboat companies are (as a conceptual rather than just an empirical matter) providers of accommodation, any comprehensive answer to (Q7) entails determinate answers to (Q4) and (Q6).

So the fact that Amy has been led to revise her original stance of justifying her answer to (Q1) on the basis of (R) does not mean that she no longer endorses the rule she had originally adopted:

- (R) For every  $x$  and every  $y$ , if  $x$  is a hotel owner and  $y$  is a guest at  $x$ ’s hotel, and money belonging to  $y$  is stolen from  $y$ ’s room without negligence on the part of either  $x$  or  $y$ , then  $x$  should be held liable for the stolen money.

On the contrary, (R) is entailed by (R2), the revised rule that Amy came to endorse:

- (R2) For every  $x$  and every  $y$ , if  $x$  is a provider of accommodation and  $y$  is an occupier of accommodation provided by  $x$ , and money belonging to  $y$  is stolen from  $y$ ’s accommodation without negligence on the part of either  $x$  or  $y$ , then  $x$  should be held liable for the stolen money.

Similarly entailed by (R2) is a rule about steamboat companies—a rule that gives an answer to (Q6):

- (R3) For every  $x$  and every  $y$ , if  $x$  is a steamboat company and  $y$  is a passenger occupying a cabin provided by  $x$ , and money belonging to  $y$  is stolen from  $y$ ’s cabin without negligence on the part of either  $x$  or  $y$ , then  $x$  should be held liable for the stolen money.

The reverse, of course, is not true: (R2) is not entailed by the conjunction of (R) and (R3).

It is worth emphasising, however, that what prompts Amy to revise her original stance of justifying her answer to (Q1) on the basis of (R) is not just that, upon reflection, she finds that there is a broader rule—(R2)—that she is prepared to endorse, and thus a broader general question—(Q7)—to which she feels she can give a comprehensive “Yes” answer. What prompts her to revise her original stance is the view that the normative considerations that support such a comprehensive answer are considerations that hold equally with regard to every instance of (R2).

In other words, Amy does not just endorse a comprehensive “Yes” answer to (Q7). She endorses what we will call a *uniform* answer to (Q7): a comprehensive “Yes” answer that she would *not* further qualify by saying “. . . but for different reasons depending on the type of accommodation provider.”

After all, if Amy thought that steamboat companies should indeed be held liable for money stolen from their passengers’ cabins, but *for reasons different from those that underpin the liability of hotel owners*, she could simply say to Barbara that although she does endorse a rule of liability for steamboat companies—rule (R3)—the rule she adopts for hotel owners—rule (R)—stands in need of no further revision. (Q4) and (Q6) would have similar answers—but she wouldn’t frame them as two aspects of a single, broader question.

So what leads Amy to revise the formulation of the rule on the basis of which she thinks her answer to (Q1) can be justified is not just that there is a more general question of which (Q4) and (Q6) can both be said to be sub-questions, and to which she thinks there is a comprehensive “Yes” answer. What leads her to revise her original formulation is that there is a more general question of which (Q4) and (Q6) can both be said to be sub-questions, and to which she thinks there is a *uniform* answer—an answer supported by normative considerations that apply in the same way to each of its instances.

## 6.5 The Risk of Over-Inclusiveness

As we pointed out at the end of Section 6.3, however, it is possible that Amy does not quite succeed, with (Q7), in capturing the relevant shared features of hotel owners and steamboat companies.

How could (Q7) fail to capture those features? Imagine that Barbara presents Amy with one last case for consideration: the case of Mr B, who embarked on an overnight journey as a passenger in a train owned by Ms T’s company. Mr B occupied a sleeping berth; he kept his money in his luggage, which was stowed in the berth; and the money was stolen without negligence on the part of either Mr B or the train company. The particular question asked is this:

(Q8) Should Ms T’s train company be held liable for the money stolen from Mr B’s berth?

The situation, Barbara points out, fully meets the description in (R2): this is a case in which accommodation was provided, and money belonging to the occupier was stolen without negligence on anyone’s part. In other words, (Q8) is—just like (Q1) and (Q5)—a sub-question of (Q7). Surely, then, she asks, Amy must agree that Ms T’s company should be held liable for the stolen money?

Again there is more than one thing that Amy could say, but one possible answer would be that she does actually *not* believe Mr T’s company should be held liable; or that if indeed the train company is to be held liable, it will be for a different reason. She might find, that is, that she thinks that the train company situation is relevantly *different* from the previous situations of hotel owners or steamboat companies. How is it different? Reflecting on this new hypothetical and on her intuitive reaction to it, and trying once again to articulate in explicit terms the features that may be driving that reaction, Amy might plausibly say that hotel rooms and steamboat companies are instances of *closed* accommodation, which entitles guests to expect that if they are not negligent, and duly lock their rooms, their valuables will be safe from

theft. A berth in a train, by contrast, is an instance of *open* accommodation—it cannot be locked—and the same expectation would not be justified.<sup>17</sup>

Upon reflection, then, Amy may come to realise that she had overshot her mark with the formulation in (Q7)—that she is after all *not* prepared to endorse a uniform “Yes” answer to such a question. Her previous formulation, in other words, was over-inclusive.<sup>18</sup> In the light of her more carefully considered views, the rule she is now prepared to adopt should be, she says, more narrowly articulated as follows:

- (R4) For every  $x$  and every  $y$ , if  $x$  is a provider of closed accommodation and  $y$  is an occupier of accommodation provided by  $x$ , and money belonging to  $y$  is stolen from  $y$ ’s accommodation without negligence on the part of either  $x$  or  $y$ , then  $x$  should be held liable for the stolen money.

And the relevant question should be correspondingly revised along the following lines:

- (Q9) Should providers of closed accommodation be held liable for money stolen from an occupier’s accommodation without negligence on the part of either the occupier or the owner?

The difference between (Q9) and (Q7) is that (Q9) singles out a property which (Q7) had failed to single out, but which is, Amy now thinks, a relevant property of the original case.

## 7 Explaining the Scheme

The discussion in the previous section has served to introduce and explain a series of notions—particular question, general question, sub-question, uniform answer—that can be put to good use, we think, in making sense of arguments by analogy in law, as well as, more generally (for the topics are interconnected), of the role played by precedent in legal decision-making.

Courts typically face *particular* normative questions on which they have to form a view, and our framework gives us one way of accounting for the structure of the justification of answers to such questions. One thing we can say, then, is that when a court is called to decide a case on which there is no applicable authority, the court’s answer to the particular question it faces will be justified by reference to a rule  $R$  such that  $R$  is the uniform answer that the court is prepared to give to a general question of which that particular question is a sub-question.

This is not intended as a description of the process by which such answers are actually arrived at—the actual process by which such answers are, as it is sometimes put, “discovered”. Our suggestion is not that the way judges come to *form* their views on the particular questions before them is by first looking for rules they are prepared to endorse, and then “applying” them. Indeed, what we have said is meant to be consistent with the picture according to which that process is at least partly driven by pre-theoretical or intuitive judgments about which facts are relevant and which answer correct—judgments that will then be elaborated and defended, at least to some extent, as judges proceed to reflect on, and to write down and make explicit (as judges typically do), the reasons that they take to substantiate their decisions.

Nor do we mean to suggest that when judges engage in the process of justifying their decisions they will actually provide fully articulated formulations of the rules that they take to

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<sup>17</sup> See note 4 above.

<sup>18</sup> As Reidhav (2007: 102-5) points out, the risk of over-inclusiveness is a cost of generalisation.

justify their answers to the particular questions before them. But we do think that it will normally be possible to work out, on the basis of what a judge says by way of justifying her decision, what the rule actually was to which she was committed. The identification of such a rule may be a more or less difficult interpretative exercise; but the main point is that the exercise is aimed at identifying the rule that can be attributed to the judge as the rule to which she *was* in fact committed.

Now in jurisdictions that adopt the doctrine of *stare decisis*—the doctrine of binding precedent—courts are bound to “follow” the decisions issued by (some) previous courts when faced, as it is normally put, with the “same” case. But what exactly does this mean?

## 7.1 Judicial Precedent: Following Versus Distinguishing

Imagine that the “previous” court, as we will call it—the court that has issued, or is about to issue, a decision which further courts will be bound to “follow” when facing the “same” case—was asked to provide an explicit formulation of the rule that captures, in the court’s view, the relevant features of the particular case with which it is concerned. To do this would be to offer a uniform answer to a general question of which the particular question before the court is a sub-question. We can once again illustrate this with the example of Amy’s first case, the case of Ms H and Mr G and the theft from Mr G’s hotel room. The rule that Amy or any similarly placed judge would formulate as *the* rule that future courts should follow when asked to decide cases that are the “same” might be, let us say, (R2):

- (R2) For every  $x$  and every  $y$ , if  $x$  is a provider of accommodation and  $y$  is an occupier of accommodation provided by  $x$ , and money belonging to  $y$  is stolen from  $y$ ’s accommodation without negligence on the part of either  $x$  or  $y$ , then  $x$  should be held liable for the stolen money.

This is, of course, the formulation that Amy would give *if* she was minded to frame the particular question of Ms H and Mr G as a sub-question of (Q7):

- (Q7) Should providers of accommodation be held liable for money stolen from an occupier’s accommodation without negligence on the part of either the occupier or the owner?

We know that, prompted by Barbara’s last hypothetical, Amy came to adopt a different rule, and to frame her particular question as a sub-question of a different general question. But there was a moment in which Amy did take (Q7) to capture the relevant features of the case—and the point is that *at any given moment* there will be one formulation that Amy or any similarly placed judge will (or would, if pressed to do so) give as the formulation that they take to capture the relevant features of the particular case before them.

What does this have to do with the doctrine of binding precedent? One standard formulation of this doctrine is that future courts are bound to either “follow” or “distinguish” the previous courts’ decisions (see Simpson 1961; Lamond 2005: 3). It is also commonly said that what binds future courts is the *ratio decidendi* of the previous decision. There have been many attempts to explain what the *ratio* of a decision amounts to, and to make full sense of the distinction (and the relation) between following and distinguishing precedent, although so far



no proposed reconstruction has fully succeeded in this task.<sup>19</sup> An understanding of analogy, however, requires that we be minimally clear about these matters as well; and we think that the distinctions we have introduced can help us to articulate a more promising account.

Our proposal is to understand the notion of the *ratio decidendi* by reference to the rule on the basis of which the previous court justified its answer to the particular question before it. The *ratio* of a decision, more precisely, is the uniform answer that—regardless of whether it was expressly articulated—was acted upon by the previous court in dealing with the general question that it took to be relevantly raised by the facts of the case at hand.

If we take (R2) as the *ratio* of Amy’s decision in the case of Ms H, what then does it mean for a future court to follow the precedent set by that decision—and what would it mean for a court to distinguish it?

Consider distinguishing first. Under the doctrine of *stare decisis*, courts are entitled to “distinguish” future cases that satisfy the *ratio* of the previous court’s decision; if they can distinguish the case at hand, they are not bound to follow the previous decision.<sup>20</sup> We can understand what distinguishing amounts to by recalling Barbara’s challenge to (R2): the example of a train passenger’s money stolen from an open berth. The point of the hypothetical, as we saw, was to show that there was a relevant feature of the particular case with which Amy was concerned—the case of the hotel owner—that (R2) failed to capture: that the hotel room was an instance of closed accommodation.

That is, we think, exactly what is involved in the judicial practice of distinguishing. Suppose that the second court does face a case like Barbara’s train passenger case. This is a particular case that instantiates the antecedent of (R2), which by hypothesis is the *ratio* of the first decision. Yet the second court may also hold the view that (R2) does not adequately capture the relevant properties of *the actual case that was before the first court*. (R2), the second court may come to think, is over-inclusive: the fact that *in the previous case* the accommodation provided—the hotel room—was an instance of closed rather than open accommodation was, the second court may come to think, a relevant fact. That means that the correct formulation the general question raised by the previous case does not encompass instances of open accommodation, and that the two particular cases are not really “the same” when understood in the light of their corresponding general questions.

To distinguish, then, is to claim that even though the case at hand satisfies the description of the first court’s decision’s *ratio*, there was a relevant property of the first case which (a) the *ratio* of the first court’s decision failed to single out, and which (b) is not satisfied in the case at hand. In this event, the future court is not bound to follow the *ratio* of the previous decision: it is at liberty to decide the second case on its merits.<sup>21</sup>

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<sup>19</sup> For some useful surveys of debate, see Cross and Harris (1991: 39-75); Collier (1988); Duxbury (2008: 58-92).

<sup>20</sup> Lawyers sometimes also use the term “distinguishing” in a different sense: they use it to refer to what a court does when, faced with a candidate (and prima facie plausible) formulation of the *ratio* of a previous decision—a formulation under which the instant case would count as being the “same” as the previous one—it offers and defends an alternative interpretation (or reinterpretation) of that *ratio* such that it no longer covers the instant case. Note, by contrast, that the sense of “distinguishing” we are concerned with in the text, which the sense in which courts are said to be duty-bound to either “follow” or “distinguish” precedent, actually presupposes that the instant case—the case to be distinguished—is and remains covered by the *ratio* of the precedent decision: on this point see Raz (2009: 185) and Lamond (2016, Section 2.2).

<sup>21</sup> There may be further conditions constraining the scope of permissible distinguishing. For example, there seems to be no room for a court to argue that the *ratio* of a previous decision was over-inclusive, on the basis that that *ratio* fails to take into account certain features of the previous case, if the previous court *did* explicitly take those features into account—if it did assess and discuss their relevance—and declared them to be irrelevant. The scope of permissible distinguishing seems to be restricted to features of the previous case whose relevance the previous court overlooked or failed to consider.

Does that mean that, as some think, the *ratio decidendi* of a case is never really binding on future courts—or that to distinguish is to *change* the *ratio* of the previous case? No; what it means is that the *ratio* of a case is a rule of a special kind.

We can think of legal rules as authoritative answers to general normative questions. A legal rule is authoritative upon us when, faced with an instance of the relevant question (or of one of its sub-questions) we are bound to adopt it—bound to adopt the answer-to-our-question that is implied by the authority’s answer to the relevant question—regardless of whether we think it is the correct answer.

Now the *ratio decidendi* of a case, too, is an authoritative answer to the general question that the previous court posed itself. But what is special about the *ratio* of a judicial decision is that future courts are only bound to follow it—bound to adopt the corresponding answer when they face a case that meets the description in the *ratio*—if the previous court *got its question right*, as it were. Future courts are bound by the previous court’s answer if the previous court’s understanding of its own question—of the question raised by the case before it—is not over-inclusive. (And if the *ratio* of a judicial decision *is* over-inclusive, then the correspondingly revised formulation of the *ratio* is still binding on future courts.)<sup>22</sup>

The binding force of the *ratio* of a judicial decision, then, is not affected by the fact that it might be deemed *under*-inclusive, in the sense that the general question to which the first court gave an authoritative answer is itself a sub-question of a (more) general question to which there is, the second court thinks, a uniform answer. And that—as should be apparent by now—is the domain of analogy.

## 7.2 The Domain of Analogy

The domain of analogy is the domain of particular cases that, even though they display the same relevant features as some previously decided case, are nevertheless not encompassed by the previous court’s own formulation of those features, as expressed in the rule on which it based its decision. The *ratio* of the previous decision offers a uniform answer to a certain general question: but that general question is itself a sub-question of a more general question to which there is also a uniform answer.

To hold that two particular cases are analogous, then, is to hold that the particular questions asked of each are both sub-questions of a general question to which there is a uniform answer; and the argument by analogy is an argument for “extending” (as is sometimes said) an authoritative answer (whatever it is) previously given to a general sub-question of a more general question *Q*, to a particular question that is both (a) a sub-question of *Q*, and (b) not a sub-question of any general question that already has an authoritative answer.

A court that decides a case by analogy, therefore, finds itself in the same position as that occupied by Amy when, having at one point offered (Q4)—

(Q4) Should hotel owners be held liable for money stolen from guests’ rooms without negligence on the part of either the guest or the owner?

—as the formulation of the relevant general question in her case, she was then confronted by Barbara with the case of the steamboat company. Amy recognised, we said, that the difference between hotel owners and steamboat companies was *not* relevant; and that is all she needs to recognise in order to grant that, *given that she had decided to hold Ms H, a hotel owner, liable*

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<sup>22</sup> On the qualification of over-inclusive *rationes decidendi*, see also Hodgson (1967: 122-3, 130-2).

*for the stolen money*, she was committed to the view that steamboat companies should also be held liable for money stolen from their passengers' cabins. That is, by recognising that the general question (Q4) is a sub-question of some other more general question to which she is prepared to give a uniform answer, Amy realises that her answer to (Q4) is the answer that is implied by the uniform answer she would give to that more general question; and she also recognises that for *any other sub-question of that more general question*, the answer that she is committed to give is also the answer that is implied by the uniform answer to that more general question.

With courts, too, this recognition of the irrelevance of the differences between the two cases is all that is required to establish that the cases are analogous, and to support the conclusion that they should be decided "in the same manner." This means that the argument by analogy, even though it depends on the claim that the previous court's general question—the question to which the previous court's *ratio* is its uniform answer—is a sub-question of a more general question to which there is a broader uniform answer (which subsumes the previous court's *ratio*), does not require the second court to formulate this broader answer. The court needs to be able to recognise that the two cases are not significantly different; but it has no need to actually identify the feature or features that both cases share, and by virtue of which they are not significantly different.

### 7.3 The Scheme at Work

We can now return to our scheme—presented in Section 5—and see that the first three premises are meant precisely to capture the point we have just made:

- (1)  $G_T$  is a general question that is not authoritatively settled.
- (2)  $G_S$  is a general question that is authoritatively settled.
- (3) There is a (more) general question of which both  $G_T$  and  $G_S$  are sub-questions, and to which there is a uniform answer. (Call this more general question " $G_C$ ".)

$G_S$  ("S" for "source") is the general question which the first court took to be relevantly raised by the first case, and which is now authoritatively settled (by virtue of the doctrine of binding precedent).

$G_T$  ("T" for "target") is a general question that is raised by the particular situation faced by the second court. It can be any general question of which the second court takes its particular question to be a sub-question, provided that  $G_T$  does not overlap with  $G_S$ .

(The second court cannot frame its particular question as a sub-question of a general question that both (a) overlaps with  $G_S$ , and (b) is a general question to which the second court has an answer that is incompatible with the *ratio* of the previous court's decision: that would amount to a breach of the doctrine of binding precedent. The second court *can*, however, frame its particular question as a sub-question of a more general question that encompasses the previous court's general question, *and* adopt a uniform answer that encompasses the previous decision's *ratio*. In that case, however, we are no longer in the domain of an argument by analogy: the second court would no longer be "extending" the previous decision to an analogous case, but simply adopting a broader rule that subsumes the previous decision's *ratio*. Common law courts do sometimes do this, but normally only when there is a considerable number of past decisions on different general questions, all of which can then be less controversially regarded as sub-questions of a broader—though normally not much broader—general question. More commonly, though, courts favour narrower formulations of their general questions, precisely because that is all they need to do in order to avail themselves of

the argument by analogy. The choice of how broadly to formulate one's general question is a normative matter of judicial policy, governed by considerations of different kinds.)

As to premise (3), notice that it does not require that the more general question,  $G_C$ , be actually formulated or identified. The statement in premise (3) is that the two general questions  $G_T$  and  $G_S$  are both sub-questions of a more general question to which there is a uniform answer, and this is something that can be affirmed and defended even if one is unable to identify precisely what that more general question is. (" $G_C$ " is a name, not an individual constant; " $G_S$ " and " $G_T$ " are constants.) As we noted, a premise like (3) depends only on the claim that the differences between the two questions are irrelevant; it does not depend on any claim about what the relevant points of similarity are.

We now need, as we know from our discussion in Section 4, a *normative* premise, and ours reads as follows:

- (4) For every  $x$  and every  $y$ , if (a)  $x$  is a general question that is not authoritatively settled, (b)  $y$  is a general question that is authoritatively settled, and (c) there is a (more) general question (" $G_C$ ") of which both  $G_T$  and  $G_S$  are sub-questions, and to which there is a uniform answer, then there is reason to adopt, with regard to  $x$ , the answer that is implied by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to- $y$ .

When is a premise like this true? What could justify it? Such questions are beyond the scope of the present paper. This paper is concerned with the *structure* of the argument by analogy, not with the grounds on which its premises could be established. Our claim is that when courts offer arguments by analogy in support of their decisions, they are committed to—even if they fail to make it explicit—a premise like (4). (Our scheme is meant as a pattern or template under which the components of the court's argument—the claims or premises to which a court that offers an argument by analogy is committed—can all be made explicit and clearly displayed; it is a tool for the reconstruction, analysis, and evaluation of analogical arguments, rather than as a model for how courts should actually motivate their opinions.) But the general idea would be that such a premise reflects the normative weight of coherent decision-making in law, as well as considerations of equality as expressed in the popular idea that "like cases" should be treated "alike".

Premises (1) to (4) deductively entail

- (5) There is reason to adopt, with regard to  $G_T$ , the answer that is implied by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to- $G_S$ .

It will then be for the court to work out (and it shouldn't be difficult) what the corresponding answer—the analogous answer—is in the target case:

- (6) The answer that is implied, with regard to  $G_T$ , by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to- $G_S$ , is answer  $A$ .

That will enable it to conclude that

- (7) There is reason to adopt, with regard to  $G_T$ , answer  $A$ .

and to then act accordingly.

What does "acting accordingly" involve? We said that two particular cases are analogous if they raise analogous general questions, and the argument by analogy is an argument about

those questions and their general answers. Note, however, that this does not rule out that two analogous cases—two particular cases that are analogous in the relevant sense—may otherwise differ in such a way that the result of applying, in the instant case, the “same” answer that had been adopted in the source case, will be a decision which is actually the *opposite* of the one issued in the previous case. Suppose that the relevant general questions,  $G_S$  and  $G_T$ , raised by the two particular cases, are questions about whether a certain fact is *necessary* for a certain outcome (favourable to one of the parties) to be legally justified. If the previous court’s authoritative answer was “Yes”, then the argument by analogy justifies answering “Yes” in the instant case as well: but then it is perfectly possible, of course, that the relevant necessary condition is met in only one of the two particular cases.

And here, before we conclude, is the argument in *Adams* reconstructed as an instance of our scheme:

- (1) The question whether steamboat companies should be held liable for money stolen from a passenger’s cabin without negligence on the part of either the passenger or the company is a general question that is not authoritatively settled. (Call this the “target question”.)
- (2) The question whether hotel owners should be held liable for money stolen from a guest’s room without negligence on the part of either the guest or the hotel is a general question that is authoritatively settled. (Call this the “source question”.)
- (3) There is a (more) general question of which both the target question and the source question are sub-questions, and to which there is a uniform answer. (Call this more general question “ $G_C$ ”.)
- (4) For every  $x$  and every  $y$ , if (a)  $x$  is a general question that is not authoritatively settled, (b)  $y$  is a general question that is authoritatively settled, and (c) there is a (more) general question (“ $G_C$ ”) of which both  $G_T$  and  $G_S$  are sub-questions, and to which there is a uniform answer, then there is reason to adopt, with regard to  $x$ , the answer that is implied by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to- $y$ .

Therefore (from (1)–(4)),

- (5) There is reason to adopt, with regard to the target question, the answer that is implied by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to-the-source-question.
- (6) The answer that is implied, with regard to the target question, by the same uniform-answer-to- $G_C$  that implies the authoritatively adopted answer-to-the-source-question, is that steamboat companies should be held liable for money stolen from a passenger’s cabin without negligence on the part of either the passenger or the company.

Therefore (from (5) and (6)),

- (7) There is reason to adopt, with regard to the target question, the answer that steamboat companies should be held liable for money stolen from a passenger’s cabin without negligence on the part of either the passenger or the company.

## 8 Conclusion

Here are three advantages of our proposed characterisation of arguments by analogy in law.

First, our scheme discharges the two burdens identified in the course of our discussion in Sections 2 to 4: it accounts for the normative character of analogical arguments in law, and retains the argumentative relevance of the source case.

Second, the theoretical framework that informs our scheme—with its distinction of particular and general questions, sub-questions, and uniform answers—allows us to offer an integrated understanding of how precedent works in legal argument. A precedent can (a) provide the source of an analogical argument (when the general question to which the instant case gives rise is a sub-question of a more general question that encompasses the previous case’s general question, and to which there is a uniform answer); (b) provide an authoritative rule to be followed (when the *ratio* of the previous decision is not over-inclusive, and encompasses the instant case); or (c) provide an answer to a general question that is, relative to the previous case, over-inclusive, and which calls to be distinguished in the instant case. The lines between these uses of precedent are sometimes blurred in the literature.

Third, our scheme and theoretical framework also enable us to make sense of the popular idea, mentioned above at the end of Section 4, that it is on the back of analogical arguments that the common law is progressively developed and extended “from case to case” without the need, at any given step, for the articulation of unifying rules. Our account brings out the grain of truth in this idea by stressing that in order to produce an analogical argument, a decision-maker does not need to identify, even implicitly, the properties that are shared by the two cases. What holds the analogy together is the fact that the general questions raised by each case are both taken to be sub-questions of a more general question to which there is a uniform answer; and that is something that one can justifiably believe regardless of one’s capacity to accurately formulate that broader question.

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